Supreme Court, U.S.
2007
OFFICE OF THE CLERK

No. 06-

IN THE

Supreme Court of the United States

ANTHONY NELSON,

Petitioner,

v.

SERGEANT J. GONZALES, Bayside; ISAAC GEORGE, librarian, Bayside; DENISE POTE, RN, Bayside; THOMAS P. SULLIVAN, Assist. Administrator, Bayside; ELMIRA KAPCHITS, MD, Rahway; SERGEANT JOHN DOE, Rahway; OFFICER R. COLLON, Riverfront; SERGEANT CARTER, Riverfront; SANUEL D. NATAL, Esquire, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

MR. ANTHONY NELSON, 294539
a.k.a. LEVELL PETERKIN
Petitioner, Pro Se
320 Broad Street
Newark, New Jersey 07104
(862) 371-9392

QUESTIONS PRESENTED

1. When the judge changes the jurors verdict after the jurors leave the court room, altered the videotapes of those verdicts in an effort to hide the acts committed and then poisoned petitioner, a remedy resort to silence complaint on appeal, will it not be considered a matter of public interest that falls within the exception rule of the moot doctrine?

2. Where officials violated their own rules and regulations, statutes, and the 8th and 14th Amendment to the United States Constitution, will the moot doctrine support the notion that the acts be ignored, no matter how severe, because petitioner has since been paroled from prison; where acknowledgment by medical doctor that petitioner appeared to be drugged, and that his liver count was up extremely high, only to recant after finding that a colleague was responsible for the poisoning?

3. Are there any recognized exceptions to the general rule of the moot doctrine where only a part of the controversy had become moot and other questions remain for decision; that a "simple blood test," would establish the merits of petitioners claim and once the poison(s) are identified, medical treatment for a possible remedy, as well as protection from respondents; where the road to redress is too slow, and health failing fast, are these but reasonable request under the circumstances, and will the law support them?

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OPINION BELOW

This case came on to be heard on the record from the United States District Court for the District of New Jersey and was submitted for possible dismissal as moot on January 11, 2007. Ordered and Adjudged on January 29, 2007, by the Circuit Court that case be dismissed as moot. The Third Circuit's opinion relied on *In re Cantwell*, 659 F.2d 1050, 1053 in support of its decision. The order of the United States Court of Appeals for the Third Circuit denied Petition for Rehearing En Banc. *See* Appendices A-C.

STATEMENT OF JURISDICTION

Petitioner filed a complaint in forma pauperis pursuant to 28 U.S.C. § 1915 and pursuant to 28 U.S.C. § 1915(e)(2) and 1915 A, District Court had reviewed the complaint to identify cognizable claims. That petitioner brought an action under 42 U.S.C. § 1983 and filed Emergent Motion for a Preliminary Injunction Pursuant to Civil Judicial Procedure and Rule 65. The United States Court of Appeals for the Third Circuit had jurisdiction pursuant to 28 U.S.C. § 1292(a)(1). This court has jurisdiction pursuant to 28 U.S.C. § 2101; 28 U.S.C. § 1254; 28 U.S.C. § 1251 and other applicable rules to review the court of appeals' decision by writ of certiorari.

CONSTITUTIONAL PROVISIONS INVOLVED

Eighth Amendment to the United States Constitution:

> Amendment VIII of the United States Constitution, which is part of the U.S. Bill of Rights, prohibits excessive bail or fines, as well as cruel and unusual punishment.

Fourteenth Amendment to the United States Constitution:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This Honorable Court has repeatedly recognized the importance to the Public at large and stated in previous decisions, with regards to moot questions that if question presented by an appeal has become moot, appeal will be dismissed without ruling on the merits, unless question involved is a matter of public interest. The fact that the judge changed the jurors verdicts after the jurors left the court room, altered the video tapes of those verdicts in an effort to hide the acts committed and then poisoned petitioner, a remedy resort to silence the complaint on appeal is a matter of public interest and fall within the exception rule of the moot doctrine. Those officials had violated their own rules and regulations, statutes, and the 8th and 14th amendments to the United States Constitutions.

REASONS FOR GRANTING THE PETITION

I. The Question Presented involves issues of Extraordinary National Importance that the lower courts will not further analyze

This Honorable Court has repeatedly recognized the importance to the public at large and stated in previous decisions, with regards to moot questions that if question presented by an appeal has become moot, appeal will be dismissed without ruling on the merits, unless question involved is a matter of public interest. The Circuit Court overlooked or misapprehended the fact that this present case is controlled by well recognized exceptions to the rule. One such exception is that regardless of the moot character of an appeal it will not be dismissed where the question involved is a matter of public interest. The application of this exception is shown by such cases as *Southern Pacific Co. v. Interstate Commerce Commission*, 219 U.S. 433, 31 S. Ct. 288, 55 L. Ed. 283; and *United States v. Trans-Missouri Freight Association*, 166 U.S. 290, 17 S. Ct. 540, 41 L. Ed. 1007. *See also Groesbeck v. Duluth, South Shore & Atlantic Railway Co.*, 250 U.S. 607-09, 40 S. Ct. 38, 63 L. Ed. 1167. Where want of controversy would leave the case moot; a matter of public interest kept the case alive. For example, in *Southern Pacific Co. v. Interstate Commerce Commission, supra*, the United States Supreme Court had considered that an order of the interstate commerce commission setting aside new rates on lumber from Willamette Valley Points to San Francisco and bay points, and restoring substantially old rates, was void and beyond the interstate commerce commission powers, where from the record in that case, and the opinion of the commission, as well as from the express exclusion of Portland from the benefit of the reduced rate,

and the reasons assigned for such exclusion, it was clear that the commission was not exercising its authority to condemn unjust and unreasonable rates, but was acting upon the assumption that it had the right to protect the lumber interests from the consequences of a change in rates, even if the change was from a rate which had been fixed unreasonably low, *Id.* Case at bar, In August of 1997, during trial the jurors were given four (4) verdicts to consider: (a) Robbery (b) Attempt-theft (c) Conspiracy to commit robbery (d) Conspiracy to commit theft. After deliberation the jurors rendered a guilty verdict to the robbery count. The jurors were then polled as to the guilty verdict on the robbery count. Next, the jurors were asked their verdict on the lesser-included offense of attempt-theft. The verdict was taken in open court and the jurors rendered a not-guilty verdict. When the bailiff was about to poll the jurors as to their not guilty verdict in open court on the attempt-theft charge, judge Natal instructed that the poll not be taken, and that they were going to try something different. There were no other verdicts taken. Now, the judge understood that a robbery occurs in the course of committing a theft and that where there is no theft or attempt-theft, there can be no robbery. In other words, the judge understood that a conviction must involve a separate theft or attempt-theft and that code provisions reveals that there is no such crime as "robbery" in the state of New Jersey without the "theft or attempted-theft" being present. *State v. Velez*, 176 N.J. Super 136; N.J.S.A. 2C: 5-1(a). The fact that the judge changed the jurors verdicts after the jurors left the court room, altered the video tapes of those verdicts in an effort to hide the acts committed and then poisoned appellant, a remedy resort to silence the complaint on appeal is a matter of public interest and falls within the exception rule of the moot doctrine. Just as the United States Supreme Court considered an order of the Interstate Commerce Commission

setting aside new rates on the lumber was void. So the court, in setting aside the jurors verdict and fixing substantially a verdict that was all his own, had exceeded the powers conferred upon it by law, because it did not act in the exercise of the authority conferred upon it to determine whether a verdict was just and reasonable in and of itself with regard to the judgment rendered, but did as was done in the abovementioned case, had proceeded upon the assumption that power was conferred upon it to fix what he considered to be an unreasonable verdict as to the equities of the situation; or upon the basis of principles of estoppels' or upon its conception of public policy and its right to enforce what it deemed best, under the circumstances. That the Circuit Court overlooked or misapprehended appraisal that certain moot claims involve issues of such importance that they deserve immediate review. In other words, cases such as this one reflect that certain moot claims are of such wide spread application and profound importance that they are reviewable on the basis of the exception, *Southern Pacific Co. v. Interstate Commerce Commission*, *supra*; *United States v. Trans-Missouri Freight Association*, *supra*. The exception is also well discussed in *Willis v. Buchman*, 240 Ala. 386, 199 S. 892, 132 A.L.R. 1179, with annotation beginning at page 1186. Because the federal circuit has exclusive jurisdiction over appeals from all of the district courts with regards to moot cases, its decision will require district courts nationwide to ignore a public interest aspect. As this case demonstrates, the federal circuit will mandate moot cases within circuits having controlling precedent to the contrary. Because petitioners verdict was changed by the judge after the jurors left the court room, he was beaten by prison officials, slammed to the ground with tremendous force and then poisoned because of his testimony on appeal, this case therefore presents "a matter of special importance to the entire

nation." *Cardinal Chemical*, 113 S. Ct. at 1971. Now, more than ever, this court should take the opportunity to address the questions of law presented to this court. Unless corrected by this court, the Federal Circuit's ruling will impose a significant burden on the resources of the federal judiciary by requiring moot cases that are of exceptional national importance, a public interest aspect, to be dismissed without any hope of being further analyzed where a case such as this one has never been presented before. This burden will extend well beyond the moot doctrine. Departing from all precedent, the Federal Circuit relied upon *In re Cantwell*, 659 F.2d 1050, 1053 (3rd Cir. 1981) *see* appendix-(b) page 3, filed January 11, 2007, ("[A]n appeal will be dismissed as moot when events occur during the pendency of the appeal which prevent the appellate court from granting any effective relief."). Because of the Federal Circuit's exclusive nationwide subject matter jurisdiction, and its refusal to rehear this case en banc, this court will not benefit from further discussion of the question presented by the lower courts. Further debate outside of this court has been foreclosed by the Federal Circuit. Therefore, there is no reason for this court to refrain from definitively resolving the question presented now. Though appellant has been paroled since the poisoning and the beatings, it remains in the public interest to hear the appeal and grant a temporary restraining order or preliminary injunction, *Walling v. Brookland Braids, Co.*, 152 F.2d 938, 940 (2nd Cir. 1945); that prison officials have violated their own rules and regulations, statutes, and the 8th and 14th amendment to the United States Constitution. It is always in the public interest that governmental officials act in a lawful manner. The United States Supreme Court has stated that relief should be "conditioned by the necessities of the public interest which [the rules, regulations, or laws] . . . sought to protect," *Hecht Co. v. Bowles*, 321 U.S. 321, 300, 64 S. Ct.

587 (1944). The intent of the government in passing its laws and requiring prison officials to comply with the laws "is a public interest aspect which cannot be ignored," *id.* at 339-40, and falls well within the recognized exceptions to the rule of the moot doctrine, (emphasis added). In *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726 (1972), the United States Supreme Court stated that

> the state must not arbitrarily inflict a severe punishment . . . the very words "cruel and unusual punishment" imply condemnation of the arbitrary infliction of severe punishment, a punishment is excessive under this principle if it is unnecessary. The infliction of a severe punishment by certain state officials cannot comport with human dignity when it is nothing more than the pointless infliction of suffering or even death to silence complaint on appeal is indeed a matter of public interest. Because the appeal was the reason for which the punishment was inflicted, the punishment was unnecessary and therefore excessive.

92 S. Ct. 2742-47, (emphasis added). Deliberate beatings, beatings of handcuffed prisoners, poison administered under the guise of a tuberculosis test by Nurse Denise Pote at Bayside State Prison. The acknowledgement by medical doctor Elmira Kapchits, that petitioner appeared to be drugged, and that his liver count was extremely high and that other test were needed to determine a diagnosis, only to recant an hour later after finding out that a colleague of hers from another facility was responsible is not only a factor which should be taken into consideration on appeal, but an act that should not have been overlooked. Other physical

torment by officers and state officials do take place in prisons and in some institutions, systematic beatings are a routine method of control (or revenge; retaliation, or amusement). Courts are increasingly recogn ing that beatings carried out "deliberately" and "with unnecessary and wanton infliction of pain" are against the law and, in rare cases, criminal and should be looked at as a matter of public interest.

II. The Federal Circuit's Decision Conflict With Many Decisions of This Court and Other Circuits

Another recognized exception to the general rule that the Circuit Court overlooked or misapprehended and conflict with the United States Supreme Court and other Circuit Court Rulings is that an appeal will not be dismissed where only a part of the controversy has become moot and other questions remain for decision. See, *Lincoln Printing Co. v. Middle West Utilities Co.*, 7th Cir., 74 F.2d 779; *Burton v. Carey*, 9th Cir., 82 F.2d 657; *Cramer v. Phoenix Mutual Life Ins. Co.*, 8th Cir., 91 F.2d 141; *Jackson v. Denver Producing & Refining Co.*, 10th Cir., 96 F.2d 457. In each of those cases only part of the issue presented had become moot and there was left in the appeal other questions which had not become moot and which affected the correctness of the judgments. For example, in *Burton et al. v. Carey, Corporation Com'r of Oregon, et al.*, Circuit Court of Appeals, 9th Circuit, 82 F.2d 657, there was an appeal from a decree dismissing a bill of complaint wherein appellants prayed for the appointment of a receiver for Union Savings & Loan Association, which had been taken over and was being operated by the Corporation Commissioner of the State of Oregon. The directors of Union Savings & Loan Association called upon the Commissioner to take possession of and operate the properties and business of the association in the interests of its investors, creditors

and shareholders. The Commissioner complied with their request and assigned a bonded deputy to such task. It would come to pass, however, that receivership was sought on the ground of maladministration. Instances of such maladministration specifically complained of were the "charge-off," or reduction in the association's liability to its shareholders, and the contract for the sale of its property and assets to Berrien. There were other and more general charges of maladministration, such as the withholding of information from shareholders, the dissemination of false information, and the employment of an incompetent deputy to manage the affairs of the association, but the "charge-off" and the Berrien contract constituted principal grounds of the suite. In that case on final hearing with the District Court, the court found that the charges of maladministration were not established, and that there was no ground for the appointment of a receiver or for granting any other relief. Accordingly, a decree was entered dismissing the bill. Subsequently, an appeal was filed with the 9th Circuit. So soon thereafter, subject to the approval of the Circuit Court, the Commissioner and Berrien entered into an agreement abrogating and rescinding their contract. On petition of the Commissioner and after due notice and hearing, the Circuit Court, approved, ratified, and confirmed the abrogation and rescission of the Berrien contract. Now, because of these facts, occurring since the appeal was taken, appellees had moved for dismissal, on the ground that the controversy has become moot. Undoubtedly, by reason of the rescission of the Berrien contract, all questions relating to that contract have become moot. However, the Circuit Court had concluded that:

> Motion to dismiss appeal on ground of moot controversy must be denied, where only part of

> questions presented have become moot. That these are not the only questions presented in the case and, the motion to dismiss was therefore denied.

Burton et al. v. Carey, Corporation Commissioner of Oregon, et al. 82 F.2d 657, at 659. Case at bar, appellant did not request compensatory nor punitive damages. Only (1) injunctive relief of removal from the custody of the New Jersey Department of Correction, (2) protection from the abovementioned defendants, (3) a "simple blood test," which would establish the merits of his claim and, once the poison(s) are identified (4) medical treatment to provide a possible remedy for the poison(s) from a federal medical provider under the watchful eye of the court. However, worst case scenario, appellant being paroled from prison would render only that portion of his relief moot, (the injunctive relief of removal from the custody of the New Jersey Department of Correction). There would still be other issues as stated above, that would remain unredress on the appeal. Because of these facts, the Federal Circuit's Decision creates a conflict among the Circuits. Typically, the decisions of the federal circuit interpreting the substantive law which pertain to the moot doctrine do not create circuit conflicts because the Federal Circuit has exclusive subject matter jurisdiction over appeals. However, the Federal Circuit's decisions can create a Circuit Conflict on issues not dependent upon an interpretation of the laws relative to the law which govern the moot doctrine. That is precisely the case here. The Federal Circuit's decision in this case does not interpret the exception to the rule which govern the moot doctrine. Instead, it purports to rest entirely upon general principles of the moot doctrine. Because the Federal Circuit's decision creates a Circuit Conflict in areas well beyond the Federal Circuit's exclusive subject matter jurisdiction, this court should grant certiorari. There are so

many cases the Circuit Court overlooked or misapprehended, too many to mention here that defeat the mootness doctrine when considering a case such as this one, a rare occurrence and is currently before this Honorable court. *See Porter v. Lee*, 328 U.S. 246, 251, 66 S. Ct. 1096, 1099, 90 L. Ed. 1199 (1946). The Porter rule has been applied in a variety of contexts to defeat moot arguments. Also see, e.g., *National Forest Preservation Group v. Butz*, 485 F.2d 408, 410-11 (9th Circuit 1973)(appeal from denial of injunction against land swap not mooted by virtue of fact that land has been transferred to another party in the litigation; *Padilla v. Ackerman*, 460 F.2d. 477, 479 n.1 (9th Cir.1972)(appeal from denial of injunction against transfer of state prisoner out of a drug treatment program not moot even though transfer has occurred, because district court had power to restore the status quo by ordering the prisoners returned to the treatment program). It should also be taken into consideration that not only had appellant been paroled from the New Jersey Department of Correction, but that if the parole board for whatever reason ordered petitioner to be sent back to prison, unknowingly, to their behest, would have restore the status quo of the abovementioned respondents, and others.

CONCLUSION

The Federal Circuit has pronounced a rule of pressing national importance. The appellate court decision directly conflicts with the precedents of this court and the Circuit Courts in matters pertaining to Public Interests. Petitioner seeks to be placed under the protection of temporary restraint against the abovementioned respondents. Petitioner's life is in constant danger. Respondents displayed deliberate indifference to certain harms that would bring about imminent death, or in the alternative, imminent danger of serious physical injury that the above respondents are deliberately indifferent to petitioners safety, health and serious medical need. Poison(s) injected into his body, mental stress, conspiracy and retaliation. When that which is superfluous is put out of view, it will come to pass that every substantial controversy which this case represents will be disposed of by determining what was the character of the judgment and/or opinion made by the court; that is to say, what was the power which that body exerted in making the judgment and/or opinion in question. Petitioner only prayed for (1) injunctive relief of the removal from the custody of the New Jersey Department of Correction, (2) protection from respondents, (3) a "simple blood test," and once the poison(s) are identified, (4) medical attention for a possible remedy from a federal medical provider under the watchful eye of the court. These can only be but reasonable under the circumstances. Yahweh showed mercy for me, barely did I escape from their hands alive. With so many denials, dismissals, obstacles and the aide of prison officials working in opposition against us, it is impossible to know, with a fair degree of certainty, how many souls have died along the road towards redress. The judgment and/or opinion of the Circuit Court conflict with Supreme Court and other Circuit Court

rulings. Indeed, the judgment and/or opinion cannot be assumed to have been made merely as the result of the power to correct an unjust and unreasonable wrong, then the reasoning by which the judgment and/or opinion, in so far as it dealt with petitioner is concerned, having been dismissed, in my opinion comes to this:

> That the greater the wrong, the lesser the right to redress; and the greater the reason to ignore a wrong committed, the stronger the reason for refusing to fix such a wrong.

Having so been poisoned and still experiencing the affects of it, the process for redress is too slow. Had it not been for the mercies of Yahweh, petitioner would have expired so long ago. Finally, for the record, petitioners habeas corpus which he filed, had the circuit court not informed him that the case was dismissed, I would have never known. District court was aware of my change of address. That I did notify them by mail as well as contacted the district court clerk by phone after being released from the half way house in September, 2006. As of today's date I still haven't received that courts order. Please be advised that efforts are being made to obtain the order and so soon following receipt of said order, the appeal will follow. For each of the reasons set forth above, this court should grant a Writ of Certiorari to the Court of Appeals for the Federal Circuit. Wherefore, petitioner pray that the relief be granted on the Writ of Certiorari that he may be free from the poison(s) which was purposely injected by state officials and now circulating through his body to bring about imminent death if left unchecked. This is my prayer.

Respectfully submitted,

MR. ANTHONY NELSON, 294539
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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED JANUARY 29, 2007

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 06-2140

ANTHONY NELSON,

Appellant

v.

STATE OF NEW JERSEY DEPARTMENT OF CORRECTIONS; COMMISSIONER DEVON BROWN

Submitted For Possible Dismissal as Moot
January 11, 2007

Before SLOVITER, CHAGARES and NYGAARD,
Circuit Judges

(Filed: January 29, 2007)

OPINION

PER CURIAM.

Anthony Nelson appeals the District Court's order denying his motion for injunctive relief. On November 8, 2004, Anthony Nelson filed an application for injunctive

relief in the District Court. Nelson alleged that the trial court in his criminal case changed the jury's verdict after the jury left the courtroom and that his challenges to his conviction led to threats from prison officials and attempts being made on his life. He stated that he was beaten by correctional officers, drugged several times, and in May 2004, was poisoned by a nurse.[1] He claimed that he subsequently experienced shortness of breath, headaches, and loss of consciousness and was denied medical treatment. Nelson alleges that a simple blood test will establish the merits of his claim. Nelson did not request compensatory or punitive damages; he requested the injunctive relief of removal from the custody of the New Jersey Department of Correction, protection from the defendants, and a blood test and medical care from a federal medical provider.

The District Court denied relief, and Nelson filed a timely notice of appeal. He subsequently filed a motion for a stay or injunction pending appeal and a motion for access to the law library. By order entered November 22, 2006, the Clerk ordered the parties to show cause why the appeal should not be dismissed as moot because Nelson had been released on parole. Nelson filed a response.

In March 2006, Nelson was released on parole. Thus, he is no longer in the custody of the New Jersey Department of Corrections or the individual defendants.[2] Nelson also

1. According to documents Nelson submitted, he was given a tuberculosis test by this nurse in May 2004.

2. Nelson argues that attempts have been made on his life since he was paroled. However, he does not give any details or allege that the defendants or the Department of Corrections were involved.

requested relief in the form of medical treatment and a "simple blood test" by federal medical authorities; however, the named defendants cannot provide such relief.[3]

Now that Nelson has been released from the custody of the Department of Corrections, none of the relief he has requested can be provided by the defendants.[4] Therefore, we will dismiss the appeal as moot. *See In re Cantwell*, 659 F.2d 1050, 1053 (3d Cir .1981) ("[A]n appeal will be dismissed as moot when events occur during the pendency of the appeal which prevent the appellate court from granting any effective relief."). Nelson's motions for injunctive relief and law library access are denied.

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3. Nelson submitted pages of blood test and urinalysis results from June and July 2004. While he does not explain their significance, the results demonstrate that he was given thorough blood and urine tests after the alleged poisoning in May 2004.

4. Nelson also argues that the pendency of a petition for habeas corpus prevents this appeal from being moot. The pendency of the habeas petition does not affect this appeal; moreover, according to the electronic docket for the District Court for the District of New Jersey, the petition was dismissed by order entered December 11, 2006.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED MARCH 10, 2006

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CIVIL #04-05511 (RBK)

ANTHONY NELSON

Plaintiff(s)

vs.

COMMISSIONER DEVON BROWN

Defendant(s)

It appearing to the Court that the above case has been pending for more than 120 days without any proceeding having been taken therein, and no objection having been entered at a call of the calendar.

IT IS on this 10th day of March, 2006

ORDERED that the above case be and the same is hereby dismissed in accordance with Local Rule 41.1(a), without prejudice and without costs to either party.

s/ Robert B. Kugler
HON. ROBERT B. KUGLER, U.S.D.J.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING DATED FEBRUARY 22, 2007

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 06-2140

ANTHONY NELSON,

Appellant

v.

STATE OF NEW JERSEY DEPARTMENT OF CORRECTIONS; COMMISSIONER DEVON BROWN

SUR PETITION FOR REHEARING

Present: SCIRICA, *Chief Judge*, SLOVITER, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, and JORDAN *Circuit Judges,* NYGAARD, *Senior Circuit Judge**

The petition for hearing filed by appellee in the above entitle case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

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* As to panel rehearing only.

Appendix C

By the Court,

MICHAEL A. CHAGARES
Circuit Judge

DATED: February 22, 2007